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ALIENATION OF RELIGIOUS OFFICES.

Adverting to an argument urged at the bar in a recent case *Suppa Bhattan* v. *Suppu Sokkaya Bhattar* [1]; Srinivasaiyangar, J. observed that the weight of authority was against the contention that an alienation of a religious office was absolutely void or that a custom of alienability should not be recognised by Courts. In support of his view the learned Judge referred to the decision of Mookerjee and Beachcroft, JJ., in *Mahamaya Debi* v. *Haridas Haldar* [2]. The alienation in the case before the learned Judge was of the hereditary office of *Alankara Miras* in a temple in Madura and was by means of a will executed by the holder of the office in favour of his nephew. The case was decided against the appellant on other points and it was not therefore necessary to consider the validity or otherwise of the transfer in question. The other learned Judge, Coutts-Trotter, J., did not express any opinion on the point. It is not clear from the language used by Srinivasaiyangar, J., whether he intended his observations to apply to testamentary dispositions, but reading them in the light of the facts of the case before him, it would seem as if he did so intend. It is not also clear whether the learned Judge intended his remarks to apply to a sale of the office, a sale for the pecuniary advantage of the transferor, or to a transfer of the office to an utter stranger. It will be noticed that the transfer in the case before his Lordship was not for value and was in favour of a nephew of the transferor and therefore to a person in the line of succession to the office. With great respect to the learned Judge, it seems to us that the correctness of his observations will depend very much upon their exact scope.

In the case of *Mahamaya Debi* v. *Haridas Haldar* [2], referred to by Srinivasaiyangar, J., the transfer had been made by

1. (1915) 29 M. L. J. 558 at p. 568. 2. (1914) I. L. R. 42 C. 455.

way of mortgage of three palas or turns of worship held by the mortgagors in a temple. The transfer was apparently for the pecuniary advantage of the mortgagors (Vide arguments of vakils for respondents reported on p. 460) and was in favour of a person who, in certain contingencies, might in his own right have become a shebait and might have held a pala. It was admitted on behalf of the mortgagee that, in the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, an alienation of the office would be invalid and the transfer in question was alleged to be valid only by virtue of a custom recognising the validity of a transfer made in favour of members of a limited class. The contention on the other side was that the custom set up was unreasonable, opposed to public policy and therefore one which ought not to be upheld by Courts. It was held by the learned Judges that the custom set up had been duly proved and that, not being either unreasonable or opposed to public policy, it was valid. This case is therefore authority only for the position that a custom permitting an alienation of a religious office even for the pecuniary advantage of the transferor may be valid if the transfer is in favour of members of a limited class. How far this decision is reconcilable with the considered dictum of their Lordships of the Judicial Committee in the *Cherakal Raja's case* [1], will be considered later on. What we desire to point out at this stage is that, in the case of *Mahamaya Debi* v. *Haridas Haldar* [2], the learned Judges did not decide or even consider the question whether a custom recognising an absolute right of transfer without any restriction as to the possible transferees would be valid. Mr. Justice Mookerjee assumes (p. 470) and, as we have stated above, it was admitted by Dr. Ghose who appeared for the mortgagee, that in the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a transfer of a religious office would be absolutely void. Mr. Justice Beachcroft does not express any opinion on this point. Except therefore to the limited extent stated above the decision of the learned Judges does not warrant the observation of Srinivasaiyangar, J., as to the weight of authority. On the general question of the validity of a transfer, in the absence of a custom sanctioning it, the view of Mookerjee, J., is against the opinion of Srinivasaiyangar, J.

1. (1876) L. R. 4 I. A. 76=1 M. 235, (252.) 2. (1914) I. L. R. 42 C. 455.

Before proceeding to examine the cases on the subject, we desire, with a view to indicate the magnitude of the divergence of judicial opinion on this branch of the law to refer to the observations of Sadasivaiyar, J., in another recent case *Sundarambal Ammal* v. *Yogavana Gurukal* [1]. After reviewing the cases dealing with the alienability of a religious office, the learned Judge observed (p. 322): "Thus the Madras High Court......has not accepted the position taken by the Bombay and Calcutta High Courts, namely, that alienation to the next in succession is valid." The learned Judge also referred to the dictum of the Judicial Committee in the *Cherakal Raja's case* [2] with reference to the invalidity of a custom sanctioning the sale of a trusteeship for the pecuniary advantage of the transferor and concluded "that the alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld even if a custom is set up sanctioning such alienation." On the question, therefore, of the validity of a custom sanctioning the alienation of a religious office for the pecuniary advantage of the transferor, the view of Sadasivaiyar, J., which is absolute and unqualified, is directly opposed to the decision of the learned Judges in *Mahamaya Debi* v *Haridas Haldar* [3], while on the question of the inalienability of a religious office in the absence of a custom to the contrary, the view of Sadasivaiyar, J., is the same as that of Mookerjee, J., and is opposed to the view of Srinivasaiyangar, J.

Proceeding now to the case-law on the subject, the case which has been treated as the leading authority is the *Cherakal Raja's case* [2], decided by the Judicial Committee so long ago as 1876. Their Lordships held that an assignment by the Urallars (managers) of a pagoda of the right of management thereof was beyond their legal competence under the Common Law of India and that no custom authorising such transfer had been established. To ascertain the scope of their Lordships' judgment, it is necessary to notice the following facts: the assignment was for consideration and was partly at any rate for the pecuniary advantage of the assignors; the assignee was a single individual unconnected with the families from which the trustees were to be taken but otherwise qualified to be trustee and probably in a better position to set the affairs of the pagoda in order

1. (1914) 26 M.L.J. 315=I.L.R. 38 M. 850. 2. (1876) I.L.R. 1 M. 235=4 I.A. 76.
3. (1914) I. L. R. 42 C. 455.

than the assignors themselves; according to the constitution of the suit institution the Urallars for the time being were to be the karnavans or chief members of four different tarwards. If the judgment of their Lordships is read with these facts in view, the case will be found to be authority for the following propositions: (1) Under the Common Law of India the transfer of a trusteeship is void (p. 250); (2) the transfer is void when it is opposed to the intention of the founder as evidenced by the constitution of the institution in question, the principle *delegatus nón potest delegare* being *prima facie* applicable to such a case (pp. 247-9); (3) a well-proved and established custom sanctioning the transfer prevails against the general law (p. 250); (4) reference to usage or custom is necessary only when there is no documentary or other *direct evidence* of the nature of the foundation and the rights, duties and powers of the trustees (p. 250); (5) the custom to be proved must be one which regulates the particular institution and not a general custom prevailing in the part of the country in which the institution in question is situated (p. 250); (6) if the custom set up is one to sanction not merely the *transfer of a trusteeship but the sale of a trusteeship for the pecuniary advantage of the trustee that circumstance alone will justify a decision that the custom is bad in law* (p. 252); and (7) there is no distinction for the present purpose between a religious and a charitable foundation (p. 249).

Before leaving the *Cherakal Raja's case* [1] it is necessary to notice if there is anything in their Lordships' judgment on two other points (1) whether the prohibition of the Common Law is absolute and (2) whether a founder is legally competent to authorise a transfer of the trusteeship and if so in what cases and subject to what conditions. On the first point a perusal of their Lordships' observations on pp. 247-250 will show that no reference is made by them to the fact that in the case before them the alienation was for the pecuniary advantage of the trustees and that there is no qualification of the rule whatever. It seems to us therefore that their Lordships did intend the prohibition to be absolute. We are confirmed in this view by the statement by the Privy Council themselves in a later case (*Velu Pandaram's case*, [2]) of the effect of their decision in the

1. (1876) L. R. 4 I. A. 76=1 M. 235 (252.)
2. (1900) I. L. R. 23 M. 271=L. R. 27 I. A. 69.

earlier case (See p. 279 of the report of *Velu Pandaram's case* [1] in 23 Mad.) On the second point, the observations of Sir Barnes Peacock quoted with approval by their Lordships at p. 251 are very important. The Chief Justice observes: "We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower." This passage clearly recognises the right of the founder to define the rights, duties and powers of the trustee and to lay down the rule of succession and states that evidence of usage, whenever it is admitted, is admitted *with a view to carry out the intention of the founder.* Usage is thus treated as evidence, though only indirect evidence, of the founder's intention. That usage is only evidence of the founder's intention appears clearly also from the observations of the Judicial Committee in the recent case of *K. P. L. S. Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* alias *Nataraja Desikan* [2]. Referring to a case in which the deed of endowment of the institution is not forthcoming, Lord Atkinson, who delivered the judgment of the Board, observed: "the rules according to which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case." See also the observations of Muthuswami Aiyar, J. in *Venkatachalapathi* v. *Subbarayudu* [3] and in *Narayana* v. *Ranga* [4]; and of Scott, J., in the *Advocate-General of Bombay* v. *David Haim Devaker, etc.* [5]. If in such cases usage is, as we have endeavoured to show, only evidence of the founder's intention, and their Lordships have in the *Cherakal Raja's case* [6] laid down that a custom sanctioning the transfer of a trusteeship will be valid but not one sanctioning the sale thereof for the pecuniary advantage of the trustee, it follows that their view on the question of the extent of the founder's rights is that he is competent to authorise the transfer of a trusteeship but not a sale thereof for the pecuniary advantage of the trustee. The founder

1. (1900) I. L. R. 23 M. 271=27 I. A. 69.
2. (1917) 33 M. L. J. 1 (P. C.)
3. (1890) I.L.R. 13 M. 293 at p. 298. 4. (1891) I.L.R. 15 M. 183 at p. 185.
5. (1886) I.L R. 11 B. 185 at p. 194. 6. (1876) L.R. 4 I.A. 76=1 M. 235 (252.)

may, for instance, empower the trustee to make a gift of the trusteeship *inter vivos* or by will or to renounce it for no valuable consideration but he is not legally competent to empower the trustee to barter away the office for his pecuniary advantage. A sale therefore of the trusteeship for the pecuniary advantage of the trustee will not be upheld by Courts even if such a transfer is expressly permitted by the founder.

Another limitation upon the rights of the founder is suggested by some observations in the recent decision of the Judicial Committee referred to above. The observations were made with reference to a case in which the deed of endowment was not forthcoming and the rules according to which the property of the endowment and its income were to be dealt with could be ascertained only by inference from the practice of the institution. Their Lordships held that the rules, so to be inferred, must not be inconsistent with or repugnant to the very nature and purpose of the endowment. Thus they observed that in the case of a temple in which the worship of the idol was intended to be perpetual, the founder must have intended the preservation and use of the dedicated property to support and maintain that worship to be perpetual also and that "a rule which would authorise and empower the shebait of such a temple, arbitrarily, at his own mere will and pleasure to alienate the dedicated property, either bit by bit or *en bloc*, would be so repugnant to the whole purpose and object of the endowment that it could not be rationally held to embody the intention of the original endower." It would thus seem that a founder is not competent to sanction any alienation which would be inconsistent with or repugnant to the very nature and purpose of the endowment. In the case therefore, for instance, of an archaka office in a Vishnu temple, it would follow that the founder is not competent to authorise the transfer of the office to a Mahomedan or a Christian because such a transfer would be inconsistent with or repugnant to the very nature and purpose of the temple. The observations of Tyabji, J., in *Sundarambal Ammal* v. *Yogavana Gurukal* [1], at p. 864 support this view. They are also authority for the position that a founder cannot authorise an alienation which is opposed to public policy.

1. (1914) I. L. R. 38 M. 850 at 861-2=26 M. L. J. 315.

The above view has, if we may say so, the merit of reconciling the rights of the founder with the prerogative of the crown to protect the interests of charities. It has been said that it is the duty of the King as *parens patriae* to protect property devoted to charitable uses. In cases, therefore, which involve the right to a religious and charitable office, as in those which involve the right of a minor or other incapacitated person, the Court itself is under a duty to see that nothing is done by the parties to prejudice the interests of the trust. It has jurisdiction to refuse to recognise, for instance, a barter of the trusteeship though it is permitted by the founder. [See the observations of Sadasivaiyar, J., in *Sundarambal Ammal* v. *Yogavana Gurukal*, [1] and of the Allahabad High Court in *Muhamad Ibrahim Khan* v. *Ahmad Said Khan* [2].]

The combined effect of the *Cherakal Raja's case*[3] and of the recent decision of the Judicial Committee referred to above may thus be stated: the transfer of a trusteeship is absolutely void under the Common Law of India; but the founder, as part of his right of defining the rights, duties and powers of the trustee, may lay down the rule of succession but cannot authorise an alienation of the trusteeship for the pecuniary advantage of the trustee nor one inconsistent with or repugnant to the very nature and purpose of the endowment nor even one opposed to public policy; evidence of the founder's intention may be direct, as when the deed of endowment is forthcoming, or indirect, as when the rules according to which the property of the endowment and its income are to be dealt with can only be ascertained by inference from the usage of the institution; the rules so to be inferred must not be inconsistent with or repugnant to the very nature and purpose of the endowment; a custom or usage sanctioning the transfer of a trusteeship may be valid but not one sanctioning the sale thereof for the pecuniary advantage of the trustee nor one sanctioning an alienation of it opposed to public policy or inconsistent with or repugnant to the very nature and purpose of the endowment.

The Cherakal Raja's case, it would have been observed, dealt only with the alienability of a trusteeship; but the law therein laid down has always been held by all the High Courts to apply to cases of alienations of religious offices also. It follows,

1. (1914) I. L. R. 38 M 850 at p. 861-2=26 M. L. J. 315.
2. (1910) I. L. R. 32 A. 503 at p. 513.
3. (1876) L. R. 4 I. A. 76=1 M. 235 (252.)

therefore, that the correct view is that an alienation of a religious office is valid or invalid according as an alienation of the office of a trustee under the same circumstances will be valid or invalid and that the rights of the founder to sanction alienations of a religious office are subject to the same limitations as they are in the case of an office of trustee.

Coming to the decisions of the Indian Courts, we find that *sales* of the office *in execution of decrees* obtained against the trustee have always been held to be invalid. There are several objections to such sales. They are opposed to Hindu law and public policy. They are against the provisions of S. 266, cl. (*f*) of the old Code of Civil Procedure (see S. 60, cl. (*f*) of the New Code). Lastly the purchasers at such sales might be persons disqualified to perform the duties of the office and so the intentions of the founder might be contravened and the very nature and purpose of the institution defeated (vide judgment of Ranade, J. in *Rajaram* v. *Ganesh* [1] and the cases therein referred to). The decision in the case of *Govind* v. *Ramkrishna* [2] one of the cases referred to in *Rajaram* v. *Ganesh* [1] also shows that the fact that the office-holder has authority in some cases to name a gumasta or substitute does not imply that he can be forced to do so, still less that in consequence his rights are alienable by a forced sale under a decree.

As regards *private alienations*, the Madras High Court has always held that they are *prima facie* invalid on the ground that a religious office stands with reference to alienability on a different footing from private property (vide *Narayana* v. *Ranga* [3]; *Annasami Pillai* v. *Ramakrishna Mudaliar* [4]; and the judgment of Sadasivaiyar, J. already referred to). This seems to be the view of the Bombay and Calcutta High Courts also; at any rate they do not countenance such alienations (see *Rajaram* v. *Ganesh* [1], at p. 136; *Trimbak* v. *Lakshman* [5]; *Sarkum* v. *Rahaman* [6]; *Girijanund* v. *Sailajanund* [7]; *Rajeswar Mullick* v. *Gopeshwar Mullick* [8], etc). On the question whether under any, and, if so, under what circumstances a private alienation will be upheld, there has, however, been considerable difference of opinion among the High Courts. A *transfer by*

1. (1899) I. L. R. 23 B 131 (135).
2. (1887) I. L. R. 12 B. 366.
3. (1890) I. L R. 13 M 293 at p. 298.
4. (1901) I. L. R 24 M. 219 (229-30).
5. (1896) I. L. R. 20 B. 495 (501).
6. (1897) I. L. R. 24 C. 83 (93).
7. (1896) I. L. R. 23 C. 645 (668).
8. (1907) I.L.R. 35 C. 226 (229).

will has been upheld by the Bombay High Court, *Mancharam* v. *Pranshankar* [1]. The transferee in the case was a person in the line of succession and this circumstance has mainly, if not solely, influenced the learned judges in upholding the transfer. The transfer was not for the pecuniary advantage of the transferor but there is nothing in the judgment to show that the learned judges relied upon that circumstance in support of their view. On the other hand, the observations on pp. 300 and 301 of the report and the reference by the learned judges to *Sitarambhat* v *Sitaram Ganesh* [2], would seem to indicate that they would have upheld even a transfer for the pecuniary advantage of the transferor provided the transferee was a person in the line of succession This is also how that decision has been understood in *Kuppa* v. *Dorasami* [3]. It therefore seems to us, with great respect to the learned judges responsible for the decision in *Sarkum* v. *Rahaman* [4] that their observations on p. 92 as to the scope of the decision in *Mancharam* v. *Pranshankar* [1] are not correct. The Calcutta High Court had to consider the validity of such a transfer in *Rajeshwar Mullick* v. *Gopeshwar Mullick* [5]. The transfer was of a hereditary shebaitship created under a will of the foundress which was forthcoming in the case. It was found as a fact by the trial judge, and that finding was not dissented from by the appellate court, that the intention of the foundress was that all her lineal descendants should hold the debutter property and jointly perform the sheba and that the only alienation which she contemplated was the gift or sale by one of her sons to one or more of the others, the property being in any event retained in the same gotra. No usage modifying the rule of succession laid down by the foundress was pleaded or proved in the case. The transferor was one of the lineal descendants of the foundress and he executed a will bequeathing the shebaitship to his widow and nephew while, under the terms of the deed of endowment, the person next entitled to succeed was the brother of the transferor. Chitty, J. in the first court, held the transfer to be invalid on the grounds (1) that the disposition was not in accordance with the wishes and intentions of the foundress and (2) that there was no established usage or

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1. (1882) I. L. R. 6 B. 298.
2. (1869) 6 B. H. C. R. 250 (A. C. J.)
3. (1883) I. L. R. 6 M. 76.
4. (1897) I. L. R. 24 C. 83 (93).
5. (1908) I. L. R. 35 C. 226 (229).

practice in the family which could justify it. vide *Rajeshwar Mullick* v. *Gopeshwar Mullick* [1]. It will be seen that, on the findings of fact arrived at by the learned judge, he could not but have held the transfer invalid and on the grounds stated by him. But, though his decision was upheld on appeal, the appellate court did not rest its judgment on the grounds relied on in the court below. All the learned judges held that, as the office of a Shebait endured only for the life of the holder of the office and his will could come into operation only on his death, there was nothing for him to alienate by will. Maclean, C. J. and Mitra, J. also held that the transfer might have been valid if there had been any usage or established practice in the family which could justify it, though Woodroffe, J. thought that the question of usage did not affect the matter then before the court. Mitra, J. was further of opinion that a shebait might transfer his office by will 'for necessity or clear benefit to the Thakur.' The other members of the court did not, however, express their opinions on this point; but the view of the learned Judge was referred to with approval in the later case of *Nirad Mohini Dassi* v. *Shibadas Pal Dewasin* [2]. In our own court the point was considered by Benson and Sundara Aiyar, JJ. in *Rajarama Aiyar* v. *Ramasami Aiyar* [3]. They held that a trustee appointed to conduct the charities with 'absolute rights,' but not expressly authorised to appoint a successor by testament, was not entitled to transfer his office by will and observed that 'a trustee would be acting illegally in disposing of his office by will, because he has no right to affect the succession which must be governed by the usage of the trust or by the law of the land.'

In view of the decisions of the Judicial Committee referred to above, it seems to us that the correct view on the question of the validity of a transfer by will would be that, under the Common Law of India, such a transfer is invalid, though it might be valid if the founder expressly permitted it or if there was a usage of the institution which could justify it; and that, even in the latter case, the transfer is invalid if it is made for the pecuniary advantage of the trustee or is opposed to public policy or is inconsistent with or repugnant to the very nature and purpose of the endowment. The validity of the transfer must be determined in the light of these considerations and does not depend upon

1. (1907) I. L. R. 34 C. 828. 2. (1909) I. L. R. 36 C. 976 (977)
3. (1918) 24 M. L. J. 476.

whether or not the devisee is a member of a limited class. We may note in passing that Woodroffe, J. stands alone in thinking that the question of usage has no bearing in such cases and that Mitra, J. and the learned Judges who took part in the decision of *Nirad Mohini Dassi* v. *Shibadas Pal Devasin* [1], started a new theory in holding that the transfer might be valid if it was 'for necessity or clear benefit to the Thakur.' The test of 'necessity or clear benefit to the Thakur' applies only to alienations of the property of a religious endowment and is altogether inapplicable to alienations of the trusteeship or of a religious office.

As regards *transfers inter vivos,* the Madras High Court has consistently declined to uphold such *transfers* when made *for the pecuniary advantage of the transferor* though in favour of members of a limited class. Thus, in *Kuppa* v. *Dorasami* [2], a sale to a person not in the line of heirs, though of the same caste and sect as the family of the alienor and otherwise qualified for the performance of the office, was held invalid. In *Narayana* v. *Ranga* [3], the Court went further and held that in the absence of special usage an alienation would not be valid if made in favour of any person other than the sole immediate heir. In this case, the alienation was by way of assignment for the pecuniary advantage of the assignor and was in favour of one of three brothers jointly entitled to the office after the death of the assignor. The ground of decision in both the cases was that to hold otherwise would be to offer an inducement to the alienor to make the office the subject of bargain and thereby defeat the intention of the founder. Again, in a case in which the intention of the founder was found to be that the right of management of the charity should be held in common by the family of the original holder, it was held in *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar* [4] that a partition arrangement among the members for the time being of the family of the original holder whereby the right of management was to be sold by auction and relinquished by the other members in favour of the member bidding the highest amount was invalid and that a purchase made in pursuance of such an arrangement would not confer any rights on the purchaser.

1. (1909) I. L. R. 36 C. 975, (977).
2. (1898) I. L. R. 6 M. 76.
3. (1891) I. L. R. 15 M. 183 at 185.
4. (1896) I. L. R. 19 M. 211.

The learned Judges observed that it made no difference that the alienee was a member of the same family and referred to the two cases mentioned above. Even a transfer by a person, who was not entitled to the office of trustee according to the intention of the founder but who had acquired it by prescription, to a person, who would have succeeded to the office but for the prescriptive title of his transferor, would, according to the Madras High Court, be invalid if any corrupt inducement had entered into the transaction and the interests of the trusts were likely to be prejudicially affected—See *Annasami Pillai* v. *Ramakrishna Mudaliar* [1]. Sadasivaiyar, J., in the case already referred to lays down the rule of prohibition against alienations for the pecuniary advantage of the trustee in absolute terms. The above seems also to be the view of the Calcutta High Court—See *Sarkum* v. *Rahaman* [2]; *Govinda Kumar Roy* v. *Debendra Kumar Roy* [3] and *Nirad Mohini Dasi* v. *Shibadas Pal Dewasen* [4]. In Bombay, however, the course of decisions has always been in favour of such alienations.—*Sitarambhat* v. *Sitaram Ganesh* [5]; *Mancharam* v. *Pranshankar* [6]; and *Rajaram* v. *Ganesh* [7]. The question whether the alienations in the above cases would have been upheld if a special usage sanctioning them had been proved is adverted to in *Narayana* v. *Ranga* [8] and *Rajaram* v. *Ganesh* [5] and considered by Sadasivaiyar, J., in the case already referred to, by Macpherson and Hill, JJ., in *Sarkum* v. *Rahaman* [2] and by Mookerjee and Beachcroft, JJ. in *Mahamaya Debi* v. *Haridas Haldar* [9]. The view of the learned Judges in *Narayana* v. *Ranga* [8] seems to be that alienations, even for the pecuniary advantage of the transferor may, if sanctioned by the usage of the institution, be valid. The point is not however considered by them and the decision in the *Cherakal Raja's case* [10] is not even referred to. The question was, however, very fully discussed by Mookerjee, J., in *Mahamaya Debi* v. *Haridas Haldar* [9] and his conclusion, which is concurred in by Beachcroft, J., is that a religious office may be alienable by custom. According to the learned Judge all customs relied upon as being in derogation of law involve some inconsistency

1. (1901) I. L. R. 24 M. 219 (229-30). 2. (1897) I. L. R 24 C. 83 (93).
3. (1907-8) 12 C.W.N. 98. 4. (1909) I. L. R. 36 C. 976.
5. (1869) 6 B. H.C.R. 250 A. C. J. 6. (1882) I. L. R. 6 B. 298.
7. (1899) I. L. R. 23 B. 131 (135) 8. (1890) I.L.R. 13 M. 293 at 298
9. (1914) I. L. R. 42 C. 455. 10. (1876) 4 I.A. 76=1 M. 235 (252.)

with the general Common Law of the realm but are not on that ground unreasonable or bad; a custom which contravenes the Common Law rule that a religious office is inalienable is not, if otherwise valid, unreasonable or opposed to public policy; and no good legal reason can be assigned against a custom sanctioning a transfer to members of a limited class who are qualified for the performance of the duties of the office.

We venture to think that, on the question of the validity of a *transfer for consideration*, apart from usage or custom authorising such transfer, the correct view is that such a transfer is invalid, whether the transferee is a member of a limited class or not. Such a transfer would also be invalid even when expressly permitted by the founder. That such a transfer would be invalid even if sanctioned by the usage of the institution was expressly laid down in the *Cherkal Raja's case* [1], and, if Mookerjee, J., intended to lay down the contrary in the case above referred to, the view would be clearly opposed to the Privy Council Judgment and cannot be therefore accepted. This is how the *Cherakal Raja's case* [1] has been understood by Sadasivaiyar, J. in *Sundarambal Ammal* v. *Yogavana Gurukal* [2] and by Macpherson and Hill, JJ. in *Sarkum* v. *Rahaman* [3], and they are of opinion that such transfers are invalid even if sanctioned by usage. *Sarkum* v. *Rahaman* [3], it may be noted in passing, related to a Mahomedan religious office and shows that the prohibition against the sale of a religious office is a principle of general jurisprudence. The error, if we may venture to say so, into which Mukerjee, J. fell was in thinking that the custom referred to in this connection was a custom in derogation of law and therefore one necessarily inconsistent with the general common law of the realm. As already pointed out, the Judicial Committee in the *Cherakal Raja's Case* [1] took care to make clear that the custom which might validate an alienation which was invalid under the common law was not a general custom obtaining in the part of the country in which the institution in question might be situate but the usage or practice of the institution which was merely evidentiary of the founder's intention. The conditions of the validity of such a usage need not necessarily be the same as those of a custom which is relied upon as being in derogation of law.

1. (1876) L. R. 4 I. A. 76=1 M. 235 (252)
2. (1914) 26 M. L. J. 315=38 M. 850.
3. (1899) I. L. R. 24 C. 83 (93).

It remains to consider when and under what circumstances an *alienation by way of gift* will be upheld by the Courts. That there cannot be an unrestricted right of transferring a trusteeship or a religious office, even by way of gift, will, we think, be readily conceded. The transferee may be a person disqualified to perform the duties of the office and the transfer in such a case will be so wholly inconsistent with or repugnant to the very nature and purpose of the institution that it ought not to be upheld even if expressly permitted by the founder or sanctioned by the usage of the institution. The invalidity of a transfer by way of gift may not be so readily conceded when the transferee is a member of a limited class, that is, either a person in the line of heirs, or one who, though not in the line of heirs, is in every way qualified to perform the duties of the office, and when the transfer itself will in no way prejudicially affect the interests of the institution. If such a transfer has been expressly prohibited by the founder or is opposed to the usage of the institution, then, of course, according to the rule that a founder's wishes will be respected if not objectionable, the transfer will be invalid. On the other hand, if it has been expressly permitted by the founder or is sanctioned by the usage of the institution, then, according to the same rule, the transfer will be upheld. But suppose a case in which there is no evidence of the founder's intentions in the matter and there is no usage sanctioning a transfer by way of gift even to members of a limited class and suppose that in such a case a transfer by way of gift is made to a person who is fully qualified to perform the duties of the office and there is satisfactory proof that the interests of the institution will not only not suffer by the transaction but may even be bettered. It may be urged that there can be no reason why the transfer should be held invalid in such a case and that the test of the validity of the transfer should be whether or not it is beneficial to the institution. The analogy of the now fully recognised right of an office-holder to appoint a gumasta or a deputy in some cases may also be invoked in support of the contention. This was the line of reasoning adopted in *Nirad Mohini Dassi* v. *Shibadas Pal Dewasin* [1], where a transfer by way of gift to a member of a limited class was upheld on the ground of its being beneficial to the institution. We venture to think, however, that even in such a case the transfer will

1. (1909) I. L. R. 36 C. 975 (977).

be invalid under the common law of India and that, as we endeavoured to show while discussing the *Cherakal Raja's case* [1], this conclusion is the logical result of their Lordships' view of the common law of India. Nor do we see why it should not be so when it is admitted that a religious office and its emoluments are *extra commercium* and not the private property of the holder. In this connection reference may usefully be made to the observations of Sadasiva Aiyar, J., in the case so often referred to above to the effect that in the case of religious offices the correct view is to regard the duties of the office as the substance of the office, the right to receive the emoluments attached thereto being regarded only as appurtenant to the said duties *Sundarambal Ammal* v. *Yogavana Gurukal* [2]. The argument based on the analogy of the right of an office-holder to appoint a gumasta in some cases does not press us because in such a case there is no dealing with the office or its emoluments by the holder and the recognition of such a right is absolutely necessary for the recognition of the hereditary element in the case of succession to such offices. Our conclusion is quite consistent with the opinion of the learned Judges in *Annasami Pillai* v. *Ramakrishna Mudaliar* [3] to the effect that a transfer by a person, who was not entitled to the trusteeship according to the intention of the founder but who had acquired it by prescription, to a person, who would have succeeded to it but for the prescriptive title of the transferor, would be valid if no corrupt inducement entered into the transaction and the interests of the trust were not likely to be prejudicially affected by it because in such a case the office merely gets back into the hands of the persons intended by the founder to hold it.

A renunciation of a religious office will, in the above view, be invalid if for valuable consideration. And, as there can be no renunciation of a person's right to such an office except in favour of those who share the right to the office jointly with him, no question of the validity of a renunciation to an utter stranger can arise. There can obviously be also no doubt as to the validity of a renunciation by one of the members of a family hereditarily entitled to a religious office in favour of all the other members, provided, of course, the renunciation is not for valuable consideration. A question may, however, arise as to the validity of a renunciation

1. (1876) L. R. 4 I. A. 76=1 M. 235 (252) 2. (1914) I. L. R. 38 M. 854.
3. (1901) I. L. R. 24 M. (219 229 at 230.)

by one of the members of a family hereditarily entitled to an office in favour of one or some only of the other members, the renunciation not being for valuable consideration. The correct view would seem to be that even in such a case the renunciation is valid only if it is assented to by the other members. See *Ramanathan Chetty* v. *Murugappa Chetty* [1].

An arrangement among members of a family jointly entitled to the office of a trustee for the due execution of the functions belonging to the office in turn or in some settled order and sequence is perfectly valid, these being no breach of trust in such an arrangement nor any improper delegation of the duties of the trustee. *Ramanathan Chetty* v. *Murugappa Chettiar* [2].

Before concluding this discussion it is desirable to notice two other points which not infrequently arise for decision in cases relating to the alienation of religious offices. The first is as to the validity of a compromise of conflicting claims to a religious office; the second, as to whether the holder of a religious office, who has alienated it under circumstances rendering the alienation invalid, is estopped from denying its validity. The answer to the first point would seem to depend upon the real nature of the transaction the validity of which is in question. If the transaction, whatever be the name given to it by the parties, is really a compromise of a dispute relating to a religious office based upon the assumption that there was an antecedent title of some kind in the parties and the agreement merely acknowledges and defines what that title is, the transaction is valid and ought to be upheld. If, on the other hand, the transaction, though termed a compromise, is in reality an alienation of the office by its holder, it is invalid and will not be upheld, unless it is of such a nature and is made under such circumstances as will make an alienation valid. The true test will be whether the alleged alienee derives title from the holder of the office (Cf. the observations of the Judicial Committee in *Khunni Lal* v. *Gobind Krishna Narain* [3]). If he does, the transaction is an alienation and is invalid; if not, it is a compromise and is perfectly valid. The preponderance of authority is certainly in favour of the above view. Thus in *Cherukunnath Manukal* v. *Vengunath Sivarupathil Padmanabha* [4], the Judicial Committee upheld

1. (1904) I. L. R. 27 M. 192 (193.)
2. (1906) I.L.R. 29 M. 283 (289.)
3. (1911) I. L. R. 33 A. 356 (366-7). P. C.
4. (1895) I. L. R. 18 M. 1 (P. C.)

a karar regarding the right to manage a temple when the karar merely provided that the affairs of the temple were to be managed 'just as they were hitherto' (pp. 11-12). In *Subbarayudu* v. *Kotayya* [1], *Lakshmanaswami Naidu* v. *Rangamma* [2], and *Sundarambal Ammal* v. *Yogavana Gurukal* [3], the alleged compromises were not upheld because they were found to be really in the nature of alienations. The extreme proposition that 'there can be no lawful compromise made of a dispute in respect of a religious office' laid down by Sadasivaiyar, J. in the last of the abovementioned cases is not, it is submitted with great respect, warranted by the authorities. The opinion of Napier, J. in *Kailasam Pillai* v. *Nataraja Tambiran* [4], that such a compromise will be valid if it is not in violation of the trust of the institution or does not affect adversely the interests of the religious public seems to us to be open to the same objection. The learned Judge in that case found as a fact (p. 289) that the right claimed under the compromise in question by one of the parties to it owed its origin to the compromise and yet the learned Judge came to the conclusion that it was valid. We venture to think that neither the Privy Council case in *Cherukunnath Manukal* v. *Vengunath Sivarupathil Padmanabha* [5], nor the decision of the Calcutta High Court in *Girijanund* v. *Sailajanund* [6], relied upon by Napier, J. really supports his view. With regard to the Privy Council case in *Cherukunnath Manukal* v. *Vengunath Sivarupathil Padmanabha* [5], we have already pointed out that it was a case of a recognition of antecedent rights and not one in which a right to the office in question was for the first time created by the compromise in favour of one of the parties to it by the other. *Girijanund* v. *Sailajanund* [6], will, on examination, be found to be a similar case. The learned Judges found as a fact that 'there was no transfer of right by either party to the compromise in favour of the other and rested their decision upon the peculiar facts of the case before them and not upon any such broad ground as that stated by Napier, J. *Thiruvambala Desikar Gnana Sambanda Pandaram* v. *Chinna Pandaram* alias *Manikkavasaka Desikar* [7], also relied upon by Napier, J. was not a case of a compromise of conflicting

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1 (1892) I. L. R. 15 M 389 (390-1).
2. (1903) I. L. R. 26 M. 31
3. (1914) 26 M. L. J. 315 ; 38 M. 850.
4. (1917) 32 M L J. 271 (290-1).
5. (1895) I. L. R. 18 M. 1 (P. C.)
6. (1896) I. L R 23 C. 645 (637-8).
7. (1915) 30 M. L. J. 274.

claims and has therefore, we venture to think, no bearing on the present question.

It remains only to consider the question of estoppel referred to above. The only cases that have dealt with this question in relation to a religious office are *Srimati Mallika Dasi* v. *Ratnamani Chakervarti* [1] and *Mahamaya Debi* v. *Haridas Haldar* [2], already referred to. In the first case, Banerji, J. was of opinion (pp. 495-6) that, if there was no misrepresentation as to facts, the transferor himself would not be estopped from pleading the invalidity in law of the transfer. The other learned Judge, Maclean, C. J., did not express any opinion on the point. Mookerjee, J. considered the point rather fully in *Mahamaya Debi* v. *Haridas Haldar* [2]. The learned Judge dissented from the view of Banerji, J. referred to above and was of opinion that the ordinary rule that a transferor is estopped from setting up the invalidity of his own act applied to the transfer of a religious office also. So far as we can gather from the report there does not seem to have been any misrepresentation of fact in the case before Mookerjee, J. and the learned Judge does not in his judgment make any distinction for the present purpose between cases where the alleged misrepresentation was as to a fact and those in which it related to a question of law. This circumstance together with the fact that the learned Judge expressly dissents from the view of Banerji, J. would seem to show that in his opinion the rule of law enunciated by him applied to both cases alike. With great respect to Mookerjee, J. we venture to think that no exception can be taken to the view of Banerji, J. so far as it goes. Everybody is presumed to know the law of the land and it seems to us that no transferee will be entitled to found a plea of estoppel on a representation by his transferor as to the validity in law of the transfer in cases in which there is admittedly no misrepresentation as to any facts relevant to the transaction. Is the rule of estoppel applicable at least to cases in which the alleged mis representation is as to a fact relevant to the transaction? Now, as we have endeavoured to show, the transfer of a religious office is under the common law of India absolutely void. It is void if made for the pecuniary advantage of the transferor though such a transfer might have been permitted by the founder or may be sanctioned by the usage of the institution. A transfer which is per-

1. (1897) 1 C. W. N. 493. 2. (1914) I. L. R. 42 C. 455.

mitted by the founder or sanctioned by the usage of the institution is void if it is opposed to public policy or inconsistent with or repugnant to the very nature and purpose of the endowment though it may not be for the pecuniary advantage of the transferor. The invalidity of a transfer in these cases being entirely a question of law, it seems to us that the rule of estoppel is not applicable to them whatsoever may be the circumstances under which the transfer is made. To cases, however, in which the transfer is not for the pecuniary advantage of the transferor, is not opposed to public policy or inconsistent with the very nature and object of the endowment, and is permitted by the founder or sanctioned by the usage of the institution, the rule of estoppel may with force be contended to apply because there may be misrepresentation as to facts in such cases. We venture to think, however, that the rule is inapplicable even in such cases. A religious office being *extra commercium*, no sort of representation by its holder ought to be allowed to impart to it the incident of alienability. Further, the transer of a religious office being opposed to public policy, it ought not to be recognised and enforced by the Court. (See *Lakshmanaswami Naidu* v. *Rangamma* [1]). Whenever, therefore, such a transfer is brought to the notice of the Courts, they are, as we have submitted above, themselves under a duty to see that there is no trafficking in the office and that the duties thereof are discharged according to the expressed intentions, if any, of the founder or according to the usage of the institution; and they are not, it is submitted, absolved from this duty by reason of any equities between the parties to the transfer. Lastly, it seems to us that the doctrine that there can be no estoppel against a Statute or against the Common Law of the land, which is "nothing else but Statutes worn out by time" would apply to such cases.

So far we have dealt with the question of the applicability of the rule in cases of the transfer of the office only. We must now consider its applicability in cases where the transfer is not merely of an office but of its emoluments also. Would the rule apply to the transfer so far at any rate as the emoluments are concerned? Obviously it would not if the emoluments are inseparably mixed up with the performance of the duties of the office. Thus an archaka of a temple is ordinarily entitled to prasadams, etc.

1. (1903) I. L. R. 26 M. 31.

offered by the worshippers to the deity and very often they are the only emoluments of the office In such cases the rule of estoppel is inapplicable altogether. But there may be offices whose emoluments are not so inseparably mixed up. They may consist of the income of immoveable or moveable property set apart for the purpose of remunerating the holder of the office. In such cases it may be urged that the rule ought to be held to apply to the transfer so far as such emoluments at any rate are concerned. If, however, as we have endeavoured to show, the right view is that the duties of the office are the substance thereof and the emoluments are merely appurtenant to it and that the emoluments of a religious office quite as much as the office itself are *extra commercium*, it would follow that the rule ought not to be applied even as regards the emoluments. We have not in discussing this question referred to the case-law on the subject of the applicability or otherwise of the rule to cases like those of the transfer of the property of a trust by its trustee because, notwithstanding the high authority of Mookerjee, J., we venture to think that the circumstances determining the applicability or otherwise of the rule in the two cases are altogether different. We may however observe in passing that it is far from settled law that the rule is applicable even in cases like those of the transfer of the property of a trust by its trustee. (See the judgment of Mookerjee, J., in *Mahamaya Debi* v. *Haridas Haldar* [1], in which most of the cases on the point are collected).

A. S. VISWANATHA AIYAR.

SUMMARY OF ENGLISH CASES.

Montreal Street Railway Co. *v.* Normandin : (1917) A. C. 170.

Statute—Interpretation—Provisions directory or imperative —Test.

On the question whether provisions in a statute are directory or imperative no general rule can be laid down and in every case the object of the statute must be looked at. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at

1. (1914) I. L. R. 42 C. 455.

the same time would not promote the main object of the legislature, the practice is to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

Fraser v. City of Fraserville: (1917) A. C. 187.

Land acquisition—Compensation—Assessment — Prospects and possibilities of future development of land acquired—Determination—Principles.

The substance of the principles which regulate the fixing of compensation of lands compulsorily acquired was thus stated by their Lordships: the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.

Yorkshire Insurance Co., Ltd. v. Campbell: (1917) A. C. 218.

Deed—Marine Insurance Policy—Construction—Principles —Words of warranty—What are—Circumstances to be considered —Founts of type if relevant to question of construction.

Prima facie, all the words which a policy of marine insurance contains (except parts of the general form inapplicable to the particular transaction) are words of contract to which effect must be given. *Prima facie*, words qualifying the subject-matter of the insurance will be words of warranty, which in a policy of marine insurance operate as conditions. In considering whether words in a policy were intended by the parties to be a warranty, regard must be had to the nature of the transaction and the known course of business and the forms in which such matters are carried out, and not to particular facts proved to have occurred at the inception of the transaction or during the negotiations.

For purposes of construction of an insurance policy founts of type in which the proposal form is printed have no legal meaning.

Watts Watts and Company, Limited v. Mitsin and Company, Limited: (1917) A. C. 228.

Damages—Measure of — Penalty clause —Limitation of liability—Shipping — Charterparty—Breach—Failure to load

—Apprehension of restraint of princes—Exception as to restraint of princes.

The ship-owners had entered into a contract with the charterers in June 5, 1914 by which it was provided that a steamer the name of which was to be declared should proceed to Marcapoul on the sea of Azov and having there taken a cargo of sulphate of ammonia should carry it to Japan for delivery there. The charterers had the option of cancelling the charter if the steamer was not ready to load by the 20th September, 1914. There was also a clause containing exceptions in the cases of arrests and restraints of princes. The 13th clause was as follows :—" Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight."

The charterers had ready sulphate of ammonia which was purchased in April of the Coppee Company and would have been shipped in due course; but in September they were informed by the ship-owners that the charterparty should be considered as cancelled because the British Government had prohibited steamers from going into the Black Sea to load, when there was really no such prohibition. The Dardanelles were closed to navigation on the 26th September when it would have been impossible for a steamer loaded with the cargo on the 20th September to pass the Straits. The price of sulphate of ammonia fell and the charterers paid £4,500 to the Coppee Company to be quit of the bargain, as they did not take delivery being unable to procure any other steamer.

In a suit by the charterers against the ship-owners to recover damages £4,500 the amount they paid to the Coppee Company.

Held, the 13th clause is only a penalty clause and cannot be read as a limitation of the right to recover proved damages.

Wall v. *Rederiakkteebolager Luggude,* (1913) 3 K. B. 66, approved.

A reasonable apprehension that the Dardanelles may be closed would not constitute a restraint of the princes so as to bring the case under the exception as to restraint of princes.

In the absence of proof of the existence of a market at Mariapoul, the measure of damages is the difference between the purchase price of the sulphate of ammonia and the price of the same in Japan when it may be expected to arrive there, less the

premium for the insurance against war risk which the charterer as a reasonable man would have effected. The amount of £4,500 paid to Coppee Company is too remote as a basis for assessing damages and as such is not the proper measure of damages.

Rex *v.* **Halliday** : (1917) A. C. 260.

Defence of the Realm—Internment of a person of hostile origin or association—Order in Council authorising internment—Validity of—Habeas corpus—*Defence of Realm Act, S. 1, Sub-S. 1—Defence of Realm Regulations (Consolidated) 1914—Regulation 14 (b)—Whether* ultra vires *the Statute.*

The material portion of S. (1), Sub-S. (1) of the Defence of the Realm Act 1914 confers on the King in Council power during the continuance of the war " to issue regulations for securing the public safety and the defence of the realm. " Regulation 14 (b) framed under the power so conferred, authorised the Secretary of State to order the internment of any person of hostile origin or associations where on the recommendation of a competent military or naval authority it appears to him expedient for securing the public safety or the defence of the realm.

One Arthur Zadig born in Germany of German parents but who had become naturalised as a British subject was ordered to be interned by the Secretary of State under the power vested in him by Regulation 14 (*b*). The question whether the Regulation was *ultra vires* the statute arose on an application for *habeas corpus* by the said Arthur Zadig.

Held by the Lord Chancellor (Lord Finlay), Lord Dunedin, Lord Atkinson and Lord Wrenbury that the effect of the regulation was merely preventive and not punitive, and that the regulation was *intra vires* the statute. Lord Shaw dissenting from the other lords, held that the statute only authorised rules which prescribed the course of conduct of the subjects in the time of war and any breach by the subject of the rules of conduct so prescribed was constituted an offence for which he was triable and punishable as for any other offence.

His Lordship discusses fully the mischief from the constitutional point of view in construing the statute as authorising the internment, without trial and the implied repeal of the *Habeas Corpus* Acts.

Davies *v.* Powell Duffryn Steam Coal Company: (1917) 1 Ch. 488 C. A.

Grant—Construction—Severance of upper and lower strata of property—Mutual rights of owners of surface and owners of minerals—Principles—Upper owner's right of support.

The question as to the mutual rights of the owners of surface and the owners of minerals where they have been severed is purely one of construction of the instrument, whether conveyance, lease, or act of Parliament by which the severance is effected. Where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication.

Fowler *v.* Midland Electric Corporation for Power Distribution, Ld.: (1917) 1 Ch. 527.

Creditor and debtor—Debtor's duty to seek creditor and pay—Company—Debentures—Place of payment not fixed in—Duty of company to seek debenture-holder—Failure of debenture-holder to present debenture for payment on due date—Effect on his right to interest.

In cases in which the registered debenture of a company does not contain a provision fixing the place for payment, the company is under a duty to seek the debenture-holder, if he is within the realm, and make legal tender of the money on the due date without request. Where therefore such a legal tender is not made and the holder of the debenture neglects to present his debenture for payment off on the due date whether from oversight, carelessness or other cause, he is not disentitled to recover from the company interest on the principal moneys secured by the debenture down to the date of actual payment.

Turner *v.* Coates: (1917) 1 K. B. 670.

Negligence—Animal likely to do harm—Damage caused by—Liability of owner for—Test—Distinction between owner of such animal and owner of ordinary domestic animal.

A person is entitled at common law to drive a flock of sheep along a highway at night without a light; and the mere fact that

an ordinary domestic animal strays from the owner's premises on to the highway does not necessarily make the owner liable because some injury is done by it while on the highway. In the case, however, of an animal which under particular circumstances is likely to do harm, its owner is under a duty to take reasonable precautions to prevent it doing harm; and, if, owing to his negligence to do so, the animal acts in precisely the way such an animal ought to have been expected to act under the circumstances and does precisely the damage which under the circumstances it ought to have been anticipated it would do, the owner is answerable for the damage so done.

Roe *v.* **R. A. Naylor, Limited**: (1917) 1 K. B. 712.

Contract of sale—Sold note—Conditions in, when binding on buyer—Seller if bound to call attention of buyer to the conditions.

When the parties to a contract of sale exchange bought and sold notes, or when the seller hands to the buyer a sold note which is accepted by the buyer as being the contractual document, it is no part of the seller's duty to request the buyer to agree to the terms contained in the sold note or to call his attention to its terms. If the buyer accepts the sold note without reading it he does so at his own risk. He is bound by any conditions which may be in the note even if he has not read them. In order to escape being bound by a clause in the note the buyer must be able to satisfy the Court that the document was calculated to mislead a reasonably careful business man.

Selby *v.* **Whitbread & Co.**: (1917) 1 K. B. 736.

Award—Validity—Direction to do impossible or illegal acts—Partly void and partly good—Effect—Court's duty in approaching award—Highway—Dedication of—Rights of public—Nature and extent—Easement of support to building from building if can be acquired by prescription—Specific performance—Decree for carrying out terms of award—Contract to erect buildings or to execute repairs if can be specifically enforced.

An award cannot direct the performance of impossible or illegal acts.

An award though void as to part may be good as to the remainder, provided the part which is bad can be separated with reasonable clearness from the part which is good. The Court

should approach an award with a desire to support rather than to destroy it.

With respect to the dedication of a highway, the public take their privileges subject to certain classes of rights which may exist in third persons.

An easement of support to a building can be obtained not merely by express or implied grant, but also by prescription. There is no distinction in this respect between support from land and support from buildings.

A decree for specific performance can in some cases appropriately be granted in order to carry out the terms of an award. *Prima facie*, however, the Court does not grant specific performance of contracts to execute repairs or to erect houses. But if the work to be done is clearly and particularly specified, and if the complaining party cannot be adequately compensated in damages, then the Court can order the specific performance even of building or similar contracts.

Harrison and Micks, Lambert and Co., In re: (1917) 1 K.B. 755.

Contract of sale—Construction—Sale of remainder of cargo Ex Clodmore "more or less about" specified quantity—Rights of seller and buyer.

The question was as to the true construction of a contract of sale in writing by which the seller sold to the buyers "the remainder of the cargo (more or less about) 5400 quarters Manitoba wheat... at Hull Ex Clodmore" with conditions indorsed on the contract, one of which was to the effect that "the word 'about' when used in reference to quantity meant within 5 per cent. over or under the quantity stated." The point for determination was whether under the contract there was a sale of 5400 quarters, "more or less about," the words 'more or less about" merely giving a 5 per cent. margin within which the buyer or the seller was bound to accept or deliver as the case might be or whether the quantity "5400 quarters more or less about" were words of estimate, and the subject-matter of the sale was the remainder of the cargo Ex Clodmore. *Held* that upon the true construction of the contract the subject-matter of the sale was the remainder of the cargo Ex Clodmore and that the buyers were bound to take delivery of the whole of the remainder whatever the quantity might be.

JOTTINGS AND CUTTINGS.

Judges and War Services :—Yet another instance of a High Court Judge being chosen by the Government to discharge important duties directly connected with the war is afforded by the appointment of Mr. Justice Younger as one of the three British delegates now engaged at the Hague in discussing with German delegates the better treatment and exchange of prisoners of war. It is a very distinguished and responsible task for which the war services previously rendered by the learned Judge eminently qualify him. Two other Judges would have been engaged in serving the country in an extra-judicial capacity if the Government had not abandoned its intention to deal immediately with the question of the state control of the liquor traffic. Lord Sumner was selected to preside over the Commission in England, while Lord Shaw was chosen to serve as Chairman of the Commission in Scotland. No better selections could have been made, and the two distinguished Law Lords will, doubtless, be again invited to perform the important duties, for which their judicial character eminently fits them, when eventually the Government finds the opportunity of dealing with the question.—*Law Journal, June 30, 1917.*

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Diplomatic Intercourse between Belligerents :—The meeting of the three British delegates with three German delegates at the Hague for the purpose of coming to some arrangement regarding the disposal and better treatment of prisoners of war is a matter of supreme interest to international lawyers. It has always been understood hitherto that the state of war operates a complete severance of all relations between the belligerents except that of pure force. Not only this, but many classes of pre-war treaties are avoided as between the belligerents, and the common practice accordingly is to re-enact pre-war treaties in or as an annexe to the treaty of peace. This barrier between the belligerents is the explanation of the common practice (followed universally in the present war) whereby the belligerents deal with each other through the intervention of neutral powers. Apart from this, the occasions for a more direct kind of intercourse are clearly defined and limited almost

entirely to distinctively military relations, such as agreements for capitulations, armistice, truces for burying the dead, safe-conducts, and pass-ports. This enumeration is that most commonly given by the authorities. Prof. Oppenheim in his treatise (Vol. II, p. 282) defines a 'cartel' in a manner which more nearly suggests the nature of the meeting now taking place. 'Cartels,' he says, 'are conventions between belligerents concluded for the purpose of permitting certain kinds of non-hostile intercourse between one another such as would otherwise be prevented by the condition of war.' The exchanges of prisoners which have already taken place were, no doubt, arranged or facilitated by cartels. But it still remains that the present Hague meeting goes considerably further, and is, it is suggested, without precedent in the history of international law. Its importance does not end there. It almost seems as if we are at last becoming emancipated from the chains of the old fashioned diplomacy, which almost deliberately made it impossible for belligerents fairly and squarely to talk out their causes of friction face to face. The new departure is one from which much may be hoped in other directions :—*Ibid.*

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The Privy Council and Indian Appeals :—The following notice has been issued with regard to the hearing of appeals to the Privy Council :—

The Registrar of the Privy Council has had under consideration of arranging fixed dates throughout the year for closing the lists of appeals to be heard during the four sittings of the Judicial Committee of the Privy Council.

At the present time the sittings of the Judicial Committee approximate closely to those of the High Court of Justice in England, which begin on January 11, nine days after Easter Sunday, nine days after Whit Sunday, and on October 1912, in each year. The Registrar, therefore, thinks that the convenience of suitors and their legal advisers throughout the Empire will be best met by requiring appeals for each sitting to be set down for hearing one week before the above dates. This will enable practitioners, both in London and beyond the seas, to estimate with accuracy the time within which records and printed cases should be completed, and will also facilitate the service of case notices. It is proposed, in

November of each year, to issue a time-table containing the four dates by which appeals intended to be heard during any particular sittings of the following year must be set down.

In accordance with the above change in practice the list of business for the next autumn sittings will close on October 5.

The Registrar has, therefore, to ask solicitors (especially those engaged in Canadian appeals) to be so good as to bring this notice to the attention of their professional clients abroad, so that they may make their arrangements accordingly.

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The following metrical version of the recent case of *Turner* v. *Coates*, (1917) (86 L. J. K. B. 321) has appeared in the columns of the Canada Law Journal:—

Good Farmer Coates a colt once had of quite a tender age,
It frisked about as colts will do, for colts are not quite sage;
A walk, he thought, his colt should take all in the summer air,
And for to lead its infant steps he got a good old mare,
And Bunce, a boy, to guide them right, he also did procure;
And in the darkness of the night he thought they'd be secure.

Behold the trio now do start upon their darksome way; [stay;
Young Bunce with care the mare did lead—the colt behind did
And as he ambled in the dark a brilliant light appeared,
Which terror struck into his heart and made him most afeared,
And when Miss Turner, on her bike approached the startled colt,
He straightway kicked her off her bike, and then away did bolt.

To justice then away she went and asked that Farmer Coates
Should, for the damage thus sustained, shell out some golden oats.
The Judge looked wise and stroked his beard, and said, 'I do declare
The damage that your colt has done, now, Coates, you must repair,"
And thus said Lush and Bailache, JJ., who on the case did sit,
' Coates for his want of care is bound to pay the maid a bit."

The author of these lines is Mr. George S. Holmsted, K.C., Senior Registrar of the High Court at Osgoode Hall, who attained his 76th birthday a few weeks ago.

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The Lawyers and the War:—Few important Ministerial changes have been made during the war in which lawyers have not possessed a special interest, and the most recent changes are not an exception to the rule. With the appointment of Sir Edward Carson as a member of the War Cabinet, the number of lawyers among the five members of the Government in whose hands rests the supreme direction of the war has been increased to three, Mr. Llyod George and Lord Milner being the other two. Even in Germany, where the conspicuous part that lawyers are taking in the affairs of the Allies has been the subject of scornful comment, lawyers may claim to be playing a larger part in a failing cause. Dr. Michaelis, the new Imperial Chancellor, is a lawyer of the professorial type:—*Law Journal, July 21, 1917.*

CONTEMPORARY LEGAL LITERATURE.

In the Amercian Law Review for May and June 1917, there are two articles of general interest, one on the Right of Asylum, especially with reference to aliens, and another on Impediments to Marriage. Right of Asylum is a very ancient institution. In the Hebrew or Mosaic Law we find reference to it. But it protected only innocent men. Not so the Greeks, and Romans. Their Temples protected all kinds of refugees whether innocent or otherwise. During the mediaeval times, there was the right of sanctuary in the churches. The influence of the church in protecting the alien has not been sufficiently noticed. Nor is the service of the church in taking the edge off slavery in Europe by affording protection to the runaway slave. The church did not protect heretics, dissenters and the excommunicated among their fold. So that other places of refuge had to be found for victims of religious persecution. Under pressure, the church excluded political offenders from the general right. However, it provided some special places for the protection of such people. Pope Alexander III, for example, established "truce of God" for the protection, not merely of monks, ecclesiastics and women but also for strangers, merchants, peasants and even animals and there were numerous similar Papal bulls. Commercial and other advantages also contributed to the according of special privileges to aliens. To-day the most generally recognised

instances of the right of asylum are the right enjoyed by foreign Embassies and of foreign countries generally as a limitation upon the right of extradition of persons charged with crime. Extradition treaties, as a rule, do not provide for religious and political offences. The American colonies were started, in fact, to provide an asylum for people persecuted for religion in their own country. They, in their turn, strictly guarded this sacred right. Even the Immigration Bill recently passed in spite of 4 Presidential vetoes, expressly exempts foreigners persecuted for their religion from the literary test insisted on from all aliens coming to the United States of America. It is the glory of the British nation to have always afforded protection to the political and religious exiles and the Immigration Act of 1905 while placing restrictions on foreign immigration, specially exempt those seeking admission solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political or religious character.

"Impediments" to marriage are of various kinds. They may be classified as those based on consanguinity, affinity, religion, race, inequality of personal status, crimes, physical defect and diseases. Prohibition on the ground of consanguinity seems to be one of gradual growth. There was no such restriction among the Scythians and the early Persians. Attila is said to have married his daugter. Egyptians married sisters. Early Roman Law prohibited the marriage of second cousins but there was a relaxation which permitted even first cousins to wed. The early bar between cousins arose from the fact that they lived together and treated each other as brother and sister. The prohibitions were not based on any physiological grounds. In Germany, Brazil and Chile, an uncle may marry his niece, not so in France, Belgium, Italy, Denmark and Portugal unless a special dispensation is obtained. In Great Britain, her colonies and dependencies, Japan and Switzerland, persons related in nearer degree than first cousins cannot wed under any circumstances. This is the law of most of the states of the Union, and of Austria. In Russia, the prohibited degrees are calculated according to the principles of the religious body to which the parties belong. According to Greek church, collaterals up to the sixth degree cannot marry. Adoption, where it is recognised, affords a bar to intermarriage. Interdiction by reason of affinity is derived from Levitical Law and was given effect to in the codes of the sons of Constantine. Interdictions in the direct

line still receive universal sanction: but the bars in the collateral line particularly as to the marriage of the deceased wife's sister or the deceased husband's brother there is the greatest diversity some countries prohibiting the one and not the other, others prohibiting or allowing both. The taking of holy orders is an absolute prohibition according to the Catholic Church. A matter full of possibilities for future international discord is the prohibition of the marriages between members of entirely different races. Inequality of personal status was long a bar for instance, the marriage of a slave with a freeman or woman was long prohibited. Among the Princes of Germany, equality of birth is a condition precedent to validity of marriage. Pre-contracts or betrothals, although their binding effect is steadily diminishing with time, remain in some countries.

The *annus luctus* or the year during which a widow is required to remain unmarried originated in Rome and obtained a wide recognition though the Canon Law did not recognise it. The only restrictions on a widower are in Sweden where he cannot remarry for six months after the death of his wife. Another of the Roman prohibitions which has obtained recognition is the prohibiting of the marriage of an adulterous woman with her accomplice. Another restriction in Roman Law was on the guardian marrying the ward, but the English Law never recognised it. Idiocy, Impotence, Insanity and Imbecility are recognised impediments to marriage under all systems. Other physical infirmities were not but are now recognised to be such under some systems, for instance Sweden and Bulgaria prohibit marriage of persons suffering from venereal diseases; and Germany and Denmark allow annulment in case of concealment. Fraud and force in procuring consent or mistake as to identity of persons is recognised to affect marriage but mistaken ideas as to personal qualities, fortune, religious belief, etc. are not grounds for annulment though in Italy, Austria and the United States ignorance of premarital pregnancy is a ground.

In the Juridical Review for October (1916).—There is a plea put in for a *Commercial Code* for the British Empire, that is to say not merely uniformity of the law is aimed at as in the United States of America but the same law enacted by the same, that is to say by the Imperial Legislature.

In the Harvard Law Review for June (1917), Professor Dicey deals in one of the leading articles with the new English War Cabinet as a constitutional experiment. The new Cabinet unlike the old of which Bagehot wrote does not contain anything like the whole body of high Government officials or of the men who at the present moment are the parliamentary leaders of the party which command a majority in the House of Commons whilst the ministers who are part of the Ministry but are not part of the Cabinet hold among them most of the high offices which entitled their holders previously to a seat in the Cabinet. In another article, Professor Lee pleads for Codification of the common law with a view to make it more intelligible and hence more acceptable to the other people of the world.

In another article, Professor Wigmore recommends an alteration in the methods of study in Harvard where law is studied on the *Case Study* system. This, he thinks, is inadequate. Law, he says, is dealt with in nature and in thought by six distinct mental activities or processes—(1) the analytic, (2) the historic, (3) the legislative, (4) the synthetic, (5) the comparative, and (6) the operative. These processes have greater or less importance at different epochs of a community's legal life and that in the present epoch the second, third, fourth and fifth are relatively more important than the others. The case study system mainly devotes itself to the analytic process. He recommends, therefore, the devoting of more time to the other processes, that is to say, to the study of Legal History, Roman Law, Contemporary Legislation, Jurisprudence and International Law.

Another article in the *Harvard Law Review* is devoted to discriminating good from bad trusts. The term "trusts" has now come to refer to extensive combinations of capital in the Commercial and Industrial world, giving them "a preponderant position in a given industry." Unlawful purposes and practices more or less accompanied all big combinations and hence combination came in itself to be distrusted. But in fact, combination may do immense good up to a certain stage and the writer thinks that sufficient protection is afforded to the public if every combination having preponderant position at the time it is organised is made to bear the burden of proving that it is innocent of all such purposes and practices.

In the University of Pennsylvania Law Review, a writer deals with the decline of traditionalism and individualism in all arts and sciences including law. Principles are now developed from observation and experiment, they are being judged by their workability and the interests now being increasingly served are those of society. The last quality is evidenced by the new nomenclature, social philosophy, social justice, social legislation and sociological jurisprudence.

BOOK REVIEWS

INDIAN RAILWAYS ACT, *by Dayabhai and Bopatlal, 2nd Edition, 1917. Rs. 14.*

We have great pleasure in announcing the second edition of the commentaries on the Indian Railways Act by Messrs. Dayabhai and Bopatlal. The first edition of the book will be familiar to our readers. So we need only say that in the book under review the first edition has been thoroughly revised and the cases both English and Indian are brought up to date. The authors have also included the general rules sanctioned by the Government of India and rules relating to explosives and dangerous goods. We would heartily recommend the book to all having to do with the Railway law.

THE CURRENT INDEX OF INDIAN CASES FOR 1916 (CRIMINAL); *The Law Printing House, Madras.*

The publication of the Digest of the Indian Cases has been long before the legal public and has been so much appreciated that we need only say that the publication for 1916 fully maintains the traditions of its predecessors.